

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

RECEIVED

DEC 30 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of the Commission's
Rules to Establish New Personal
Communications Services

)
) GEN Docket No. 90-314
)
) RM-7140, RM-7175, RM-7618
)

To: The Commission

DOCKET FILE COPY ORIGINAL

OPPOSITION

NYNEX Corporation, on behalf of New York Telephone Company, New England Telephone and Telegraph Company and NYNEX Mobile Communications Company (collectively "NYNEX"), submits this Opposition to various Petitions for Reconsideration ("petitions") of the Commission's Second Report and Order (hereinafter "Order") released October 22, 1993 in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY OF POSITION

More than fifty parties have filed petitions seeking reconsideration of virtually every aspect of the Order. For example, petitioners seek reconsideration of the appropriate number of PCS licenses, license areas, technical requirements and eligibility rules. In many instances, the reconsideration sought would promote the Commission's desire to create a regulatory environment in PCS that would foster robust competition between a broad range of providers. In such

No. of Copies rec'd
List A B C D E

Orig. 46

instances, NYNEX supports the positions adopted by these parties.

A number of parties, for example, ask the Commission to reconsider its frequency allocation plan and offer the Commission alternative proposals which they suggest would better promote the competitive development of PCS.¹ As evidenced by its own petition for reconsideration, NYNEX agrees with these parties that some fine-tuning of the Commission's allocation plan is required to avoid potential impediments to the development of all PCS spectrum blocks.²

The parties do not agree, however, on the form this fine-tuning should take. NYNEX has proposed that the Commission simply modify its basic allocation plan to position the 10 MHz spectrum blocks between the 30 MHz blocks and move the 20 MHz allocation to the higher PCS spectrum band. In our view, such an approach would facilitate economic interoperability between different sized PCS blocks while, at the same time, remaining true to the Commission's objective to award seven PCS licenses, among three frequency blocks, in order to promote regional and local markets.³ NYNEX believes that its proposal is most consistent with the Commission's intent and should be seriously considered by the Commission.

¹ See, e.g., PCS Action at 3-8; Secretary of Defense at 3; TDS at 2; CTIA at 2; BellSouth at 17; Bell Atlantic at 3; Time Warner 2-10.

² NYNEX at 6-11.

³ NYNEX at 2-3.

NYNEX also agrees with those parties who urge the Commission to reconsider the aggregation limits and attribution criteria adopted in the Order.⁴ The standard adopted in the Order that would limit cellular eligibility for PCS licenses where the cellular carrier has an ownership interest of 20 percent or more in cellular systems is too low. The standard would impair the ability of cellular carriers to participate, even as a passive investor, in consortia that would seek to hold PCS licenses for large regions. In addition, the standard would substantially inhibit the participation by the LECs and their cellular affiliates in financial arrangements that would promote the participation of designated entities.⁵ Thus, NYNEX agrees with those parties who would have the Commission look to control as the essential feature to determine cellular attribution. These petitioners correctly observe that antitrust laws and economic theory serve as more suitable benchmarks for control, rather than artificial attribution standards that have no relation to market power.⁶

⁴ See, e.g., US West at 27; Sprint at 2-7; Columbia Cellular at 7; GTE at 8-10; Comcast at 15-16; CTIA at 24; Bell Atlantic at 5.

⁵ NYNEX at 13-15.

⁶ See petition filed by Bell Atlantic, for example. A passive investment, without the ability to exert control over managerial decisions, is an insufficient basis to determine attribution since a passive investor has no ability to exert undue influence on marketing decisions.

A large number of petitioners seek reconsideration of the 10 percent overlap requirement.⁷ NYNEX supports their view that the proposed standard fails to recognize the fact that cellular carriers have no market power either in cellular or PCS markets. Moreover, the number of competitors under the proposed licensing scheme ensured that no single competitor will achieve such market power. In this competitive environment, the 10 percent PCS overlap rule is overly restrictive.

There are several parties who continue to urge the Commission to exclude or substantially restrict the participation by the LECs or their cellular affiliates in the provision of PCS. As set forth in Section II, NYNEX shows that the Commission should reject such requests. It is clear that these parties are not interested in promoting the public interest. Instead, these parties seek to use the regulatory process to promote their own private interests by excluding those parties who have the proven ability to stimulate vigorous competition from full participation in the provision of PCS services.

In Section III, we address the contention of several petitioners that the Commission should ease the build-out requirements adopted in the Order. While we recognize the concerns of these parties over the costs associated with building a PCS system that complies with the coverage

⁷ See, e.g., Petitions filed by BellSouth; Mebtel; Motorola; Columbia; NTCA; SWB; US West; Bell Atlantic; PNS and various small or rural telephone companies.

requirements, we believe that the elimination of the build-out requirements would result in a PCS market composed of haves and have-nots. In our view, such a result is inconsistent with the public interest. The concerns of these parties are better accounted for in the amounts that they are willing to pay for the spectrum.

II. THE COMMISSION SHOULD PROVIDE ALL ENTITIES WITH A MEANINGFUL OPPORTUNITY TO PARTICIPATE IN THE COMPETITIVE DELIVERY OF PCS

One of the Commission's primary goals in this proceeding is to promote the competitive development of PCS. In our view, a regulatory structure that encourages the full participation by all qualified entities and promotes robust competition is most likely to result in the rapid deployment of PCS and the delivery of reasonably priced services. There are some would-be PCS participants who would have the Commission eliminate any meaningful opportunity that cellular carriers, including LEC affiliates, may have to provide PCS services. For example, MCI and GCI suggest that the nine largest cellular carriers should be precluded from one of the 30 MHz licenses.⁸ In addition, Comcast argues that only nonwireline carriers should be fully eligible for PCS spectrum.⁹ Comcast argues further that, to the extent that LECs are permitted limited eligibility for PCS spectrum, the provision of PCS by LECs should be subject to strict structural separation

⁸ MCI at 2-5; GCI at 5-8.

⁹ Comcast at 2-12.

requirements.¹⁰ The Commission should reject these self-serving requests for protection from competition.

The record in this proceeding makes it abundantly clear that significant public interest benefits will be realized by allowing cellular carriers and their LEC affiliates the freedom to participate fully and freely in PCS markets. In fashioning its cellular regulatory regime, the Commission recognized that the LECs were uniquely well-qualified to construct and deploy cellular systems in a timely manner. As a result, the Commission specifically encouraged LEC participation through the adoption of the wireline set-aside. The performance by the LECs in the years following the Cellular Communications Systems decision have more than met the Commission's expectations and trust. The participation by the LECs in the development and growth and the cellular industry has played a major role in bringing high quality service to people on the move at highly competitive prices.

If given the opportunity to do so, the LECs and their cellular affiliates can bring the same benefits to the provision of PCS that they have brought to the cellular market. In fact, these public interest benefits can be achieved without the Commission incurring any substantial regulatory risk.¹¹

¹⁰ Comcast at 19-21.

¹¹ NYNEX has previously demonstrated that the structural separation requirements suggested by Comcast are not justified by market conditions. Indeed, their imposition would disserve the public interest by limiting competition NYNEX at 16-22. The Commission should ensure that competition is promoted in both the PCS and cellular

Because the cellular carriers do not, or will not, have market power in either the cellular or PCS markets, their full participation cannot limit competition in the provision of those services.¹²

Under these circumstances, the Commission should reject MCI's, GCI's and Comcast's requests for further limitations on cellular carrier eligibility. Moreover, the very factors which require the rejection of those requests warrant the Commission eliminating all present restrictions on cellular carrier/LEC eligibility. In doing so, the Commission would permit the full participation of cellular carriers in those areas where they can provide the greatest benefit.¹³

III. THE COMMISSION SHOULD NOT RELAX ITS BUILD-OUT REQUIREMENTS

A number of petitioners seek relaxation of the build-out requirements adopted in the Order.¹⁴ Southwestern

11 (Footnote Continued From Previous Page)

markets. In this regard, we suggest that the Commission respond to petitions that seek a variety of different technical requirements regarding the power limitations for PCS services by adopting technical parameters for PCS that are comparable to those already in place for cellular services.

12 See, e.g., McCaw at 2-4.

13 At the very least, the Commission should adopt sunset provisions on the LEC/cellular eligibility restrictions. As we explained in our petition, the eligibility restrictions should be eliminated after the initial auctions in order to permit market forces to shape the PCS market. NYNEX at 13-15.

14 The Order requires PCS licensees to offer service to one-third of the market area population within five-years,

Bell, for example, proposes that the Commission adopt a target of 25 percent population coverage to be achieved within ten years for all non-aggregated 10 MHz licenses.¹⁵ Pacific Bell and Nevada Bell urge the Commission to modify its proposal to eliminate the 90 percent build-out requirement¹⁶ and BellSouth urges the Commission to eliminate all of its coverage and build-out requirements.¹⁷ NYNEX believes that these proposals are inconsistent with the Commission's objective of universality of service and should not be adopted.

The petitioners advocating a change in the build-out requirements argue that rigid build-out requirements will make it difficult for certain carriers -- particularly those with 10 MHz blocks or those serving predominantly rural areas -- to be commercially successful. Although we are mindful of these concerns, a relaxation of the build-out and coverage requirements would likely result in a situation where substantial segments of the population would be indefinitely denied access to PCS services. Such a result would be inconsistent with national policy to bring the benefits of new and emerging technologies to all the people of this country in the shortest possible time.

14 (Footnote Continued From Previous Page)

two-thirds of that population within seven years and ninety percent of that population within ten years of licensing.

15 SWB at 6.

16 Pacific Bell/Nevada Bell at 5.

17 BellSouth at 10.


NYNEX believes that there is a better way for potential PCS licensees to recognize the difficulties that may be associated with meeting build-out requirements in certain markets. These parties have sufficient opportunity to adjust their bids for any frequency block to reflect the unique capital requirements that may be generated by the particular demographics of each market.

IV. CONCLUSION

The Commission has the opportunity on reconsideration to modify its Order to promote the competitive development of PCS by permitting all PCS licensees an opportunity to compete on an even regulatory playing field. We urge the Commission to grant those petitions for reconsideration, discussed herein, that will further those pro-competitive objectives. At the same time, the Commission should, as it has done in the past, reject the requests by those who seek private gain by hobbling their competitors through the imposition of artificial regulatory restraints.

Respectfully submitted,

NYNEX CORPORATION

By: 
Edward R. Wholl
Jacqueline E. Holmes Nethersole

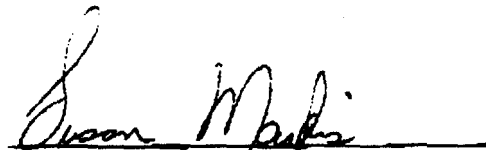
120 Bloomingdale Road
White Plains, NY 10605
914-644-5735

Their Attorneys

Dated: December 30, 1993

CERTIFICATE OF SERVICE

I, Susan Markis, hereby certify that on December 30, 1993, a copy of the foregoing OPPOSITION in GEN Docket No. 90-314 was served on each of the parties listed on the attached Service List by first class U.S. mail, postage prepaid.

A handwritten signature in cursive script, reading "Susan Markis", written over a horizontal line.

Susan Markis

Scott K. Morris
Vice President - Law
McCAW CELLULAR COMMUNICATIONS,
INC.
5400 Carillon Point
Kirkland, Washington 98033

John A. Prendergast
Julian P. Gehman
Blooston, Mordkofsky, Jackson & Dickens
2120 L Street, N.W., Suite 300
Washington, D.C. 20037
Attorneys for AMERICAN AUTOMOBILE
ASSOCIATION, INC.

David Cosson
L. Marie Guillory
2626 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Attorneys for NATIONAL TELEPHONE
COOPERATIVE ASSOCIATION

Jonathan D. Blake
Kurt A. Wimmer
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
Attorneys for AMERICAN PERSONAL
COMMUNICATIONS

Robert J. Miller
Gardere & Wynne, L.L.P.
1601 Elm Street, Suite 3000
Dallas, Texas 75201
Attorneys for ALCATEL NETWORK
SYSTEMS, INC.

Wayne V. Black
Christine M. Gill
Marc Berejka
Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
Attorneys for AMERICAN PETROLEUM INST.

David L. Nace
Pamela L. Gist
Lukas, McGowan, Nace
& Gutierrez, Chartered
1819 H Street, N.W.
Seventh Floor
Washington, DC 20006
Attorneys for ALLIANCE OF RURAL
AREA TELEPHONE & CELLULAR SERVICE
PROVIDERS

Bruce D. Jacobs
Glen S. Richards
Fisher, Wayland, Cooper & Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037
Attorneys for AMSC SUBSIDIARY
CORPORATION

Arlene F. Strege
AT&T BELL LABS
Rm 2A-382
67 Whippany Rd
Whippany, NJ 07981

Leonard J. Kennedy
Laura H. Phillips
Richard S. Denning
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D.C. 20037
Attorneys for COMCAST CORPORATION

John A. Prendergast
Blooston, Mordkofsky, Jackson
& Dickens
2120 L Street, NW
Suite 300
Washington, DC 20037
Attorney for CHICKASAW TELEPHONE COMPANY

John S. Hannon, Jr.
Nancy J. Thompson
6560 Rock Spring Drive
Bethesda, MD 20817
Attorneys for COMSAT MOBILE COMMUNICATIONS

Ellen S. Deutsch
Jacqueline R. Kinney
CITIZENS UTILITIES COMPANY
P.O. Box 340
8920 Emerald Park Drive
Suite C
Elk Grove, CA 95759-0340

Howard Polsky
6560 Rock Spring Drive
Bethesda, MD 20817
Attorney for COMSAT WORLD SYSTEMS

Harold K. McCombs, Jr.
DUNCAN, WEINBERG, MILLER & PEMBROKE, P.C.
1615 M Street, N.W.
Suite 800
Washington, D.C. 20036

Philip L. Verveer
Sue D. Blumenfeld
Francis M. Buono
Willkie Farr & Gallagher
1155 21st Street, N.W., Suite 600
Washington, D.C. 20036-3384
Attorneys for CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION

Carl W. Northrop
Bryan Cave
Suite 700
700 13th Street, N.W.
Washington, DC 20005
Attorney for GEORGE E. MURRAY

Michael F. Altschul
CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION
Two Lafayette Centre, Third Floor
1133 21st Street, N.W.
Washington, D.C. 20036

Gail L. Polivy
1850 M Street, N.W.
Suite 1200
Washington, DC 20036
Attorney for GTE SERVICE CORPORATION

James U. Troup
Laura Montgomery
Arter & Hadden
1801 K Street, N.W.
Washington, D.C. 20006
Attorneys for IOWA NETWORK SERVICES, INC.

James P. Tuthill
Theresa L. Cabral
Betsy Stover Granger
140 New Montgomery St., Rm. 1529
San Francisco, CA 94105
Attorneys for PACIFIC BELL
and NEVADA BELL

Stephen G. Kraskin
Kraskin & Associates
2120 L Street, N.W.
Suite 810
Washington, D.C. 20037
Attorneys for U.S. INTELCO
NETWRKS, INC.

James L. Wurtz
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Attorney for PACIFIC BELL
and NEVADA BELL

Larry Blosser
Donald J. Elardo
MCI TELECOMMUNICATIONS CORPORATION
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

David L. Nace
Lukas, McGowan, Nace &
Gutierrez, Chtd.
1819 H Street, N.W. Seventh Floor
Washington, D.C. 20006
Attorney for PACIFIC TELECOM
CELLULAR, INC.

Timothy E. Welch
Hill & Welch
Suite #113
1330 New Hampshire Ave., N.W.
Washington, D.C. 20036
Attorney for MEBTEL, INC.

Brian D. Kidney
Pamela J. Riley
Kathleen Q. Abernathy
PACTEL CORPORATION
2999 Oak Road, MS 1050
Walnut Creek, CA 94596

Michael D. Kennedy
Michael Menius
Mary Brooner
MOTOROLA, INC.
1350 I Street, NW
Suite 400
Washington, DC 20005

M. John Bowen, Jr.
John W. Hunter
McNair & Sanford, P.A.
1155 Fifteenth Street
Washington, D.C. 20005
Attorneys for PMN, INC.

John Hearne, Chairman
POINT COMMUNICATIONS COMPANY
100 Wilshire Boulevard, Suite 1000
Santa Monica, California 90401

William Roughton, Jr., Esq.
VP and General Counsel
BELL ATLANTIC PERSONAL
COMMUNICATIONS, INC.
1310 N. Courthouse Road
Arlington, Virginia 22201

Jay C. Keithley
Leon M. Kestenbaum
1850 M Street N.W.
Suite 1100
Washington, D.C. 20036
Attorney for SPRINT CORPORATION

William B. Barfield
Jim O. Llewellyn
BELLSOUTH
1155 Peachtree Street, N.E.
Atlanta, Georgia 30367-6000

Stuart F. Feldstein
Richard Rubin
Fleischman and Walsh
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036
Attorneys for TIME WARNER
TELECOMMUNICATIONS

Thomas A. Stroup
Mark Golden
TELOCATOR
1019 19th Street, N.W.
Suite 1100
Washington, D.C. 20036

Norman P. Leventhal
Raul R. Rodriguez
Stephen D. Baruch
David S. Keir
Leventhal Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006-1809
Attorneys for TRW INC.

David L. Nace
Pamela L. Gist
Lukas, McGowan, Nace & Gutierrez, Chartered
1819 H Street, N.W.
Seventh Floor
Washington, D.C. 20006
Attorneys for the ALLIANCE OF RURAL
AREA TELEPHONE AND CELLULAR
SERVICE PROVIDERS

Jeffrey L. Sheldon
Sean A. Stokes
UTILITIES TELECOMMUNICATIONS COUNCIL
1140 Connecticut Ave., N.W.
Suite 1140
Washington, D.C. 20036

David L. Jones, Chairman
RURAL CELLULAR ASSOCIATION
2120 L Street, N.W., Suite 810
Washington, D.C. 20037

Jeffrey S. Bork
Suite 700
1020 19th Street, N.W.
Washington, D.C. 20036
Attorney for U S WEST, INC.

Francine J. Berry
Kathleen F. carroll
Attorneys for AMERICAN TELEPHONE
& TELEGRAPH COMPANY
Room 3244J1
295 North Maple Avenue
Basking Ridge, NJ 07920

Meyer, Fallor, Weisman and
Rosenber, P.C.
4400 Jenifer Street, N.W.
Suite 380
Washington, D.C. 20015
Attorneys for PRIVATE CARRIER
PAGING

James D. Ellis
Paula J. Fulks
175 E. Houston R 1218
San Antonio, TX 78205
Attorneys for SOUTHWESTERN BELL
CORPORATION

O'Connor & Hannan
1919 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20006-3483
Attorneys for FLORIDA CELLULAR RSA
LIMITED PARTNERSHIP

Kathy L. Shobert
Director, Federal Regulatory Affairs
888 16th Street, N.W., Suite 600
Washington, D.C. 20006
Attorney for GENERAL COMMUNICATIONS,
INC.

Koteen & Naftalin
1150 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
Attorneys for TELEPHONE AND DATA
SYSTEMS, INC.

W. Scott McCollough
ASSISTANT ATTORNEY GENERAL
STATE OF TEXAS
P.O. Box 12548
300 W. 15th Street, 7th floor
Austin, TX 78701

Frank Michael Panek
Attorney for AMERITECH
2000 West Ameritech Center Dr.
Hoffman Estates, IL 60196

James E. Meyers
Susan R. Athari
Baraff, Koerner, Olender & Hochberg
Counsel for PEGASUS COMMUNICATION,
INC.
5335 Wisconsin Avenue, N.W., Suite 300
Washington, D.C. 20015

James R. Rand
Wilkes, Artis, Hedrick & Lane,
Chartered
1666 K. Street, N.W.
Washington, D.C. 20006
Attorneys for ASSOCIATION OF PUBLIC
SAFETY COMMUNICATIONS OFFICIALS
INTERNATIONAL, INC.

Catherine Wang
Swidler & Berlin, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
Attorneys for SPECTRALINK, CORP.

Linda C. Sadler
Manager, Governmental Affairs
ROCKWELL INTERNATIONAL CORPORATION
1745 Jefferson Davis Highway
Arlington, VA 22202

Young & Jatlow
Suite 600
2300 N. Street, N.W.
Washington, D.C. 20037
Attorneys for THE ERICSSON, CORP.

Matthew L. Dosch
Lisa M. Zaina
21 Dupont Circle, N.W.
Suite 700
Washington, D.C. 20036
Attorneys for OPASTCO

Stephen L. Goodman
Halprin, Temple & Goodman
1301 K Street, N.W.
Suite 1020, East Tower
Washington, D.C. 20005
Attorneys for NORTHERN TELECOM, INC.

Piper & Marbury
1200 Nineteenth Street, N.W.
Seventh Floor
Washington, D.C. 20036
Attorneys for PCS ACTION, INC.

E. Ashton Johnston
Bryan Cave
700 Thirteenth Street, N.W.
Suite 700
Washington, D.C. 20005-3960
Attorneys for PERSONAL NETWORK
SERVICES CORPORATION

Henry M. Rivera
Larry S. Solomon
Ginsburg, Feldman & Bress, Chartered
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorneys for METRICOM, INC.

Deborah Lipoff
Office for the General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554
Attorney for RAND MCNALLY

Eric Schimmel
Jesse E. Russell
TELECOMMUNICATIONS INDUSTRY ASSOCIATION
(TIA) THE MOBILE PERSONAL
COMMUNICATIONS DIVISION
2001 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20006

Henry Goldberg
Goldberg, Godles, Wiener
& Wright
1229 Nineteenth St., N.W.
Washington, D.C. 20036
Attorneys for APPLE COMPUTER, INC.

Barry R. Rubens
Manager-Regulatory Affairs
THE CONCORD TELEPHONE COMPANY
68 Cabarrus Avenue, East
P.O. Box 227
Concord, North Carolina 28026-0227

John A. Prendergast
Susan J. Bahr
Blooston, Mordkofsky, Jackson
& Dickens
2120 L Street, N.W.
Suite 300
Washington, D.C. 20037
Attorneys for RADIOPHONE, INC.

Paul R. Schwedler
Assistant Chief Regulatory Counsel
Telecommunications (DOD) Code AR
Defense Information Systems Agency
701 S. Courthouse Road
Arlington, VA 22204
Attorneys for the NATIONAL
COMMUNICATIONS SYSTEM

Lukas, McGowan, Nace & Gutierrez,
Chartered
1819 H Street, N.W.
Seventh Floor
Washington, D.C. 20006
Attorneys for COLUMBIA CELLULAR
CORPORATION

Chandos A. Rypinski
Lace, Inc.
655 Redwood Highway #340
Mill Valley, CA 94941